

No. 10361.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HILLCONE STEAMSHIP COMPANY, a corporation, SANTA
CRUZ OIL COMPANY, a corporation, and ASSOCIATED
INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

ALBERT V. STEFFEN,

Appellee.

APPELLANTS' CLOSING BRIEF.

S. S. TIPTON,
975 Subway Terminal Building, Los Angeles,

A. G. RITTER,
915 Black Building, Los Angeles,

Attorneys for Appellants.

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TOPICAL INDEX.

PAGE

The question before the trial court was a legal and not a factual one	1
The Longshoremen's and Harbor Workers' Act was enacted to provide compensation for longshoremen and harbor workers upon navigable waters when state compensation statutes are inapplicable	3
Steffen was not a member of the crew and his claim, if any, is based on contract, not on tort.....	4
Conclusion	6

TABLE OF AUTHORITIES CITED.

	PAGE
Crowell v. Benson, 285 U. S. 22.....	4
Davis v. Department of Labor & Industries of the State of Washington, 87 L. Ed., Adv. Ops. 175.....	5
Grant Smith-Porter Ship Company v. Rhode, 257 U. S. 469.....	5
Moore Drydock Company v. Pillsbury, 100 Fed. (2d) 245.....	5
Seneca Washed Gravel Corporation v. McManigal, 65 Fed. (2d) 779	6
Shipbuilding etc. Co. v. Industrial Accident Commission, 57 Cal. App. 355	5
South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 84 L. Ed. 732.....	3, 4
Union Oil Company v. Pillsbury, 63 Fed. (2d) 925.....	6

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The Question Before the Trial Court Was a Legal and
Not a Factual One.

There is no serious dispute between the parties as to the facts herein. A hearing was had before the Deputy Commissioner under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. He decided solely that he had no jurisdiction and refused to hear the proceedings further. Thereafter all the testimony and findings were certified to the trial court and upon that record and the pleadings it was submitted to the Trial Court upon briefs and as a question of law. According to the stipulation of counsel the question of law to be determined by the trial court was "Was the service or

employment of the libelant Albert V. Steffen as watchman on the S. S. Prentiss at the time of his injury maritime in character?"

If the trial court decided that question in the negative, there was an end of the matter. If it was decided in the affirmative, as it was, what was the effect of the decision? It is our contention that such question being decided in the affirmative, the sole power of the court was to send back the proceedings for further hearing before the Commissioner. Upon the questions which were peculiarly within the jurisdiction of the Commissioner, the trial court could not find facts for the Commissioner. The trial court was limited to deciding the question of law presented. The question presented to the trial court was only the legal one, upon which depended jurisdiction of the Commissioner. The court having decided that the Commissioner had jurisdiction under the Longshoremen's Act had no other alternative but to send the case back for determination by him of the basic facts of injury, the nature and extent of injuries and the amount of compensation to which the injured man was entitled, if any. It is not claimed by either party that the Commissioner has passed upon said facts. In truth, he expressly refused to do so and held that he had no jurisdiction. In the absence of any findings of facts by the Commissioner, it seems obvious to us that the trial court could not make findings for the Commissioner, but that the Commissioner should be directed to make his own findings in the manner governed by statute after a hearing before him.

We have in our opening brief cited authorities and discussed this phase of the case on pages 19 to 23, inclusive. We refer to it here because of the opening statement of case in appellee's reply brief.

The Longshoremen's and Harbor Workers' Act Was Enacted to Provide Compensation for Longshoremen and Harbor Workers Upon Navigable Waters When State Compensation Statutes Are Inapplicable.

As an initial proposition appellee states: "The purpose of the Longshoremen's and Harbor Workers' Compensation Act was to provide compensation to all those various sorts of longshoremen and harbor workers who were performing labor on a vessel." In support of such proposition appellee cites the case of *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 84 L. Ed. 732, at 736.

Appellee does not quote the entire language of Justice Hughes in setting forth the issues in the cited case. The court says:

"We think it clear that Congress in finally adopting the phrase * * * intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel *and to whom state compensation statutes were inapplicable*. The question is whether decedent, in this instance, fell within that class."

In other words, the holding of the court as stressed by our italics was that the statute was applicable to those longshoremen *to whom state compensation statutes were not applicable*.

We have heretofore attempted, in our opening brief, pages 10 to 18, inclusive, to show that the compensation laws of California did apply to Steffen and therefore he had a remedy in California and not one under the Longshoremen's Act. It is not contended by either side here that Steffen was a member of the crew. If he were a

member of the crew, he would be barred from compensation under the provisions of the Longshoremen's Act.

In *Crowell v. Benson*, 285 U. S. 22, also cited by appellee, the court again emphasizes that the Longshoremen's Act is applicable in maritime employment "*if recovery through workmen's compensation proceedings may not validly be provided by state law.*"

Steffen Was Not a Member of the Crew and His Claim, If Any, Is Based on Contract, Not on Tort.

In the *South Chicago* case cited by appellees, the decedent was an employee of the steamship company and was drowned while serving his employer as a laborer aboard the vessel. The case on its facts was a different one and it was properly held that the deceased was in a maritime occupation. In the case at bar it must be kept in mind that Steffen was a watchman at all times on a boat which was not used for maritime purposes at any time during the performance of his services. We again refer to our argument on pages 10 to 18, inclusive, of our opening brief, and respectfully maintain that "In contract matters admiralty jurisdiction depends upon the nature of the transaction and, in matters of tort, the locality." We refer again to the cases cited there by us. We believe that this case is not one within the admiralty jurisdiction of the court and that the action was improperly brought there. We believe that the action should have been in the nature of a writ to compel the Commissioner to take action and assume jurisdiction and that it was not proper to have the questions determined by an admiralty court as an admiralty proceeding *in personam*. No tort is claimed by appellees. Any rights of Steffen arose by reason of contract between Steffen and his em-

ployer to act as a watchman upon this boat which was not at any time during his employment used for maritime services. The fact that the boat was resting upon waters in a dock does not change the law that we have just cited and that has been pronounced repeatedly by the courts of the United States and California in cases such as *Grant Smith-Porter Ship Company v. Rhode*, 257 U. S. 469; in *Shipbuilding etc. Co. v. Industrial Accident Commission*, 57 Cal. App. 355, and other citations set forth in pages 10 to 13, inclusive, of our opening brief.

In the case of *Moore Drydock Company v. Pillsbury*, 100 Fed. (2d) 245, at 246, cited by appellee, the question was "whether decedent Howland at the time of his death was an employee under the act or excepted from the act as a member of a crew of any vessel." The Longshoremen's Act provided that no compensation shall be payable in respect of the disability or death of "a master *or a member of a crew of any vessel*." Howland was properly held in that case not to be a member of the crew. The question of whether or not he should have received compensation under the Workmen's Compensation Act of California was not raised. The boat was in use and went about San Francisco Bay and on inland waterways as far as Stockton. Decedent had been employed for several years as a rigger and aboard a launch for repairing boats. The facts and the questions of law in said case are entirely different from those in the case at bar.

Appellee's argument that since the injuries occurred on the navigable waters of the United States, it was not compensable under any state workers' compensation act is refuted by the recent decision of *Davis v. Department of Labor & Industries of the State of Washington*, 87 L. Ed., Adv. Ops. 175, which case is referred to by both parties herein.

Another case relied upon by appellee is the case of *Union Oil Company v. Pillsbury*, 63 Fed. (2d) 925. In that case the injured man was third officer and a member of the crew. He had no outside contract at the time of his injury. That case seems to us to hold that where a member of the crew is engaged in outside duties he may come within the provisions of the act. Those facts were entirely different from a case where an outsider who is not a seaman or a member of the crew, such as Steffen, who is hired to perform duties which are not maritime in character and where his injuries do not arise from tort of the employers and where he is primarily within the provisions of the State Act for the benefit of employees. The holding in the *Union Oil* case was on the question as to whether or not the injured man was a member of the crew. Nobody here claims that Steffen was a member of the crew of the *Prentiss*. If he were, he would be out under the provisions of the act. So in the case of *Seneca Washed Gravel Corporation v. McManigal*, 65 Fed. (2d) 779, the question determined was whether or not the deceased was a member of the crew and it was held that he was not.

Conclusion.

For convenience we have referred at times to Steffen as the injured man. It is not conceded that he ever was injured in the course of his employment. The Commissioner never determined that fact and it was the contention before him that Steffen's condition was due to natural causes and not to any injury. The trial court could not determine that matter. It was solely for the Commissioner if he had jurisdiction at all. If he had jurisdiction, which we do not concede, he should be directed to

proceed with the case and make his findings on the issues of fact before him, which includes the question of injury. The trial court can not do that for him in a proceeding such as this where the sole question presented was one of law. Steffen was never engaged in a maritime occupation. The vessel was at all times out of use. The fact that it was in the water did not under the ruling of the cited cases change the law that one whose duties were not maritime in character and where the obligation arose entirely from contract and not from tort, should proceed under the State Laws enacted for his benefit and not under the Federal Longshoremen's Act before the Commissioner. Admiralty jurisdiction was not present here. We respectfully submit that the decision of the trial court should be reversed.

S. S. TIPTON,

A. G. RITTER,

Attorneys for Appellants.

